Supreme Court of the United States

OCTOBER TERM, 1928.

No. 24.

IDAHO IRRIGATION COMPANY, LIMITED, and THE EQUITABLE TRUST COMPANY OF NEW YORK and LYMAN RHOADES, as Trustees, et al.,

Appellants,

against

FRED W. GOODING, et al., and the STATE OF IDAHO,

Appellees.

Reply Brief of The Equitable Trust Company of New York and Lyman Rhoades, as Trustees, *et al.*

HARRISON TWEED,
Counsel for The Equitable Trust Company of New York, and Lyman Rhoades, as Trustees, et al.

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No. 324.

Reply Brief of The Equitable Trust Company of New York and Lyman Rhoades, as Trustees, *et al.*

On behalf of the mortgage trustees, we submit a concise analysis and discussion of what we believe to be the issue framed by the briefs of the irrigation company and of the plaintiff settlers with respect to the effect of the action of the Secretary of the Interior in granting patent to the State.

At the outset it may be well to state just what is meant when it is said that a determination of the Secretary of the Interior is final and conclusive in dealing with the public lands of the United States. Congress has exclusive jurisdiction over the disposition of these lands. In disposing of them, it is convenient and appropriate, if not, indeed, compulsory, that Congress should confide

the administration and execution of the provisions of the statute to the Department of the Interior. It is essential to that end that whatever the Secretary does in accordance with the provisions of the statute shall be final and conclusive. Otherwise, the execution and administration of the statute and the disposition of the lands of the United States would be taken out of the hands of the proper department of the Government and become the subject of litigation in the courts. It has been established by a long series of decisions of this Court that a determination of the Secretary of the Interior made pursuant to an Act of Congress cannot be collaterally attacked. There may be some question of the precise nature and extent of the determination required by the statute, but once that is established and the determination has been made, the law is clear that no one except the United States can attack it in the courts.

As we conceive the issue in the case at bar, it concerns the nature and the extent of the determination which the Carey Act requires shall be made by the Secretary of the Interior, and does not raise any question of the finality and conclusiveness of that determination.

The contention of the plaintiffs appears to be that all that the Secretary of the Interior is required to do as a condition precedent to the granting of patent is "*to estimate*" the acreage that can be reclaimed. Their conclusion is that since the Secretary's finding is merely an estimate, it is not conclusive upon the State or its assigns, and the question whether all, or only a portion, and how much of the land patented is to receive water from the irrigation system, is left open for de-

cision by the State, the irrigation company and the settlers, or, if they disagree, for decision by the courts. In other words, the plaintiffs assert that the scheme of the Carey Act is that the determination of the amount of land of the United States to be reclaimed by a particular project is *not* reserved and confided to the Secretary of the Interior, but is delegated to the State, which remains free to determine how much of the land shall be transferred to settlers for cultivation. If the premise is sound and the other questions in the case are left out of consideration, we concede the correctness of the conclusion.

Our position, on the other hand, is that the Carey Act requires the Secretary of the Interior to conclusively determine how much land of the United States is to be reclaimed by a particular irrigation system before issuing patent to the State. Our conclusion is that since the Carey Act requires the Secretary to determine how much of the land is to be reclaimed, and since the State takes title under the Act, it takes subject to that determination. It can not thereafter violate the terms of the grant by refusing to transfer the land to prospective settlers or, what amounts to the same thing, escape the operation of those terms by refusing to sell water rights. If it can not refuse to sell water rights, neither can it (either directly, or indirectly through the irrigation company,) give the first purchasers a monopoly of the water supply by guaranteeing them a specified amount of water, and thereby disqualify itself to sell additional water rights. To do that would be to prevent the reclamation of a part of the land of the United States granted to the State

upon the condition that all of it shall be offered for reclamation.

The consideration for the grant of the land was the obligation of the State to permit the use of the appropriated waters for the reclamation and cultivation of all of the land. Any agreement is void whereby the State (directly, or indirectly through its agent the irrigation company) disqualifies itself to perform that obligation by assuming contractual duties which are or may be inconsistent with that obligation. The words of the court in *McKinney* v. *Development Co.*, 167 Fed. 770, 777 (C. C. A.) are very much in point:

> "The assertion of such a right flies in the face of a fundamental principle of law, that, where a grant of power under a statute is given for the accomplishment of the state's policy, the due performance of the function by the grantee is the consideration for the public grant; and consequently any contract by the grantee which tends to disable it from performing its entire function * * * is violative of the contract with the State and contrary to public policy."

The amount of land which will be reclaimed is, of course, subject to this natural economic limitation that to the extent that there is no one willing to purchase water rights for use in the cultivation of the land, the land must remain unsold and uncultivated. And this, it may be noted, is the ultimate test of the adequacy of the water supply. The willingness of prospective settlers to purchase water rights for use upon the land of the United States is a complete demonstration that, provided there is no priority among users, there remains

sufficient water for the cultivation of additional land. No one is going to buy water rights and land, construct a home and farm buildings, buy machinery and equipment, and devote his time and labor to the cultivation of the land, unless he is reasonably assured that there will be an adequate supply of water. This is the ultimate economic test of the correctness of the Secretary's determination. So long as its application is not arbitrarily altered by an agreement to give the first purchasers a definite amount of water instead of merely a proportionate interest in the total appropriation, there is no conflict with the scheme of the Carey Act. But just as soon as a definite amount of water is allocated to the first purchasers, and the rule of proportionate interests and no priorities is violated, the scheme of the statute and the determination of the Secretary of the Interior are set at naught and there is a breach of the condition upon which the State accepted the grant.

It may be appropriate to notice here the inconsistency of the plaintiffs' position in alleging as a basis for equitable relief that their water rights will not furnish an adequate amount of water for ordinary agricultural purposes if more water rights are sold, and at the same time stating that unless an injunction is granted more water rights will be sold. Obviously, more water rights cannot be sold unless there is someone to purchase them, and if there are willing purchasers of further proportionate interests in the water supply, how can it be said that the land already settled will be rendered worthless if the water is proportionately allocated to additional land?

To return to the issue: does the Carey Act require that the Secretary of the Interior determine the amount of land of the United States to be reclaimed by the particular irrigation system, or does it leave this question open for determination by the State, the irrigation company and the settlers, or, if they disagree, by the courts?

The sole support suggested by the plaintiffs for their contention that the Carey Act merely requires the Secretary of the Interior "*to estimate*" the amount of land to be reclaimed, and leaves the final determination to others is that, as was said in one of the cases cited on their brief, "the question of the sufficiency of the water supply for the irrigation of a tract of land must always be a matter of approximate estimate." We agree that the question is not capable of precise determination, but we think that that is the very reason why the determination of such a question with respect to property of the United States was reserved to the Secretary of the Interior instead of being left open for litigation in the courts. The question must be determined by someone. The plaintiffs assert that it may be determined by the courts. We believe that Congress provided that it should be determined by the Secretary of the Interior. Clearly, the fact that it can not be precisely determined by any one does not tend to prove that Congress intended that it should be determined by the courts.

We sustain our position that the Carey Act requires a determination by the Secretary of the Interior of the amount of land of the United States to be reclaimed, by reference to (1) the traditional policy of the United States, (2) the history of the

Carey Act, (3) the provisions of the Carey Act, and (4) the provisions of the State statutes.

1. The Traditional Policy of the United States.

There is sound logic in the policy whereby the Secretary of the Interior is to determine all questions of fact arising in connection with the disposition of the public lands of the United States. The lands belong to the United States and they are to be dealt with in the interests of its people. If the Government should delegate their administration to others it would be derelict in its duty as trustee of these vast natural resources.

It has always been the policy of the United States to confide to the Department of the Interior all questions with respect to the public lands, and as was said in *Bishop* v. *Gibbon*, 158 U. S. 155, 166:

> "It may be laid down as a general rule that, in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the Land Department. It falls there unless there is an express direction to the contrary."

At the very least, therefore, the plaintiffs carry the burden of proof to demonstrate that the administration of the Carey Act does not fall within the jurisdiction of the Secretary of the Interior, and that the fundamental question of how much

land of the United States is to be reclaimed by a particular system is taken out of his hands and left open for decision by the State or the courts.

2. The History of the Carey Act.

The first statute was the Act of Congress of August 8, 1894 (28 Stat. I. 422). This statute provided that upon submission by a State of a plan to construct an irrigation system for the reclamation of arid lands including those of the United States, the Secretary of the Interior, as a preliminary step, should reserve or segregate certain specified lands of the United States. The statute provided that thereafter:

> "as fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the State, or its assignees, for said lands so reclaimed and settled."

It is obvious that under this statute the determination of the amount of land of the United States to be reclaimed by a particular irrigation system was reserved to the Secretary of the Interior. He had the entire discretion to determine whether any, and, if so, how much, of the public lands of the United States should be granted for irrigation by a particular system. He could withhold patent to segregated land and neither the State nor any individual could resort to the courts to compel him to grant title. Conversely, patent having been granted,

neither the settler's title nor his right to water could be questioned in the courts. The question of the amount of the land of the United States to be reclaimed by the particular project was forever removed from the realm of litigation.

The purpose of the amendment of 1896 (29 Stat. L. 434) as stated by the plaintiffs and as appears from the discussion reported in the Congressional Record (Vol. 26, Part 8, p. 8123, Part 5, p. 8405, Part 7, p. 6222) was to give the irrigation company which constructed the system a lien to secure its investment. Accordingly, the amendment authorized the States to create liens upon the land, and it was provided that:

> "when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs to reclaim a particular tract or tracts of such land, then patents shall issue for the same to such State without regard to settlement or cultivation."

This was the only change made in the procedure. It amounted simply to this: that the Secretary of the Interior was authorized to issue a patent without waiting until prospective settlers had purchased water rights and had occupied and cultivated the land. Under this procedure the lien of the irrigation company attached as soon as it had complied with its undertaking, and thereafter it could look to the land for reimbursement. It is not to be assumed that Congress intended to make any greater change in the nature of the procedure, to limit any more than was necessary the administrative control of the Secretary of the Interior or to grant to the State any greater authority than

the necessities of the situation required. Certainly, it is not to be supposed for a moment that Congress intended to depart from its traditional policy and to delegate to the States and the courts the right to determine how much of the land of the United States should be reclaimed by a particular project.

If the plaintiffs' construction of the amended statute is correct and the Secretary of the Interior was to do nothing but "estimate" the amount of land to be reclaimed, and that essential question was left open for subsequent determination, the amendment failed to accomplish its very purpose. A lien upon land which may or may not be entitled to any water is practically worthless. It is obvious that Congress must have intended that the Secretary of the Interior should conclusively determine the amount of land to be reclaimed, that the lien should arise as soon as the land was patented to the State, and that the State should be under the obligation to sell the appropriated water for use in the cultivation of all of that land, provided only that there were prospective settlers willing to buy the water and cultivate the land. In that way only could adequate security be given to private investors.

3. The Provisions of the Carey Act.

The words of the Carey Act quoted above leave no room for doubt that there is imposed upon the Secretary of the Interior as a condition precedent to the granting of patent, the obligation to determine whether the water supply is adequate for the reclamation of the land to be patented.

There is nothing in the statute to suggest that

this is merely an estimate and that in spite of the Secretary's examination, determination and issuance of patent, the State, after having accepted the land, may decide for itself the adequacy of the water supply and upon the basis of that decision turn around and refuse to transfer the land to settlers, or, what is the equivalent, refuse to sell water rights for use in the cultivation of the land. It has repeatedly been held that the consideration for the grant of the land by the United States is the dedication of water by the State. Therefore, it is not to be supposed that Congress required nothing more than an *estimate* of the extent of the consideration. The extent of the consideration was the essential condition precedent to the granting of title.

It would, we think, require strong words to indicate that the invstigation and determination of the Secretary of the Interior should be as evanescent as the plaintiffs represent it. In *Burke* v. *Southern Pacific Co.*, 234 U. S. 669, the statute granted to the railroad company certain public lands and provided that if any of them were mineral lands they should be excluded, and indemnity allowed in recompense. There being no provision that the question of the character of the lands should be determined by the Secretary of the Interior, it was claimed that under a patent expressly excepting mineral lands the railroad company acquired no title to land of that character. Nevertheless, this Court held that the statute did require a determination by the Secretary of the Interior, that the issuance of patent constituted a determination that the land was not mineral, and

that the exception, being unauthorized by the statute, was void. At page 683, this Court said:

> "Words hardly could make it plainer that mineral lands were not included but expressly excluded. This is fully recognized by counsel on both sides. But by whom and when was it to be determined whether lands otherwise within the grant were mineral and therefore excluded, or non-mineral and therefore included? How long was the question of the exclusion or inclusion of particular sections to be an open one? Was it to depend upon a discovery of mineral at any time in the future, even a hundred years after the completion of the railroad, or was it intended that the mineral or non-mineral character of the lands should be determined in administering the grant, and that, depending on the result, patents should issue or indemnity be allowed? We think these questions find clear and decisive answers in the granting act when considered in the light of settled principles of general application to the administration of the public-land laws, including railroad land grants."

See also the quotation from *Bishop* v. *Gibbon*, 158 U. S. 155, at page 7 of this brief.

Under the Carey Act, the Secretary of the Interior is expressly required to determine the adequacy of the water supply. Therefore, he must ascertain the amount of water available and the amount per acre which will be required for cultivation, and, in accordance therewith, fix the acreage of the land of the United States which is to be reclaimed. In other words, the purpose of the statute is, as therein expressly stated, to aid

in reclaiming the desert lands, and to the Secretary of the Interior is confided the determination of the amount of land to be reclaimed by a particular project. There is, of course, room for a wide difference of opinion as to the area which may most advantageously be irrigated by a given amount of water. The decision depends largely upon the character of crops to be raised. One man or court or commission might think it advisable that each acre of land should have a very large amount of water, in the belief that the object should be to cultivate highly a small area of land. Another man or court or commission might have a contrary conviction and believe that the best interests of the community are conserved by cultivating less intensely a larger area of land. This is the precise reason why Congress confided the question to the appropriate department of the United States.

(4) **The Provisions of the State Statutes.**

If it had not been understood that the Carey Act contemplated that the amount of land to be reclaimed should be conclusively determined by the Secretary of the Interior, we should expect to find in the State statutes some provision directing how and when and by whom that determination should be made. Yet an examination of the Idaho statutes discloses that they contained no such provision. It is true that in 1919, two years after this suit was brought, an amendment was made whereby the State Board of Reclamation was given the power to order that no more water rights should be sold if and when it should be of the opinion that the water supply was inadequate

for the irrigation of additional lands. Probably, even if this statute had been in force at the time that the land was patented by the Secretary of the Interior, its provisions would have been inoperative. But that is a question with which we are not concerned. The important point is that no such a provision was originally contained in the Idaho statutes, and that its insertion was an after thought apparently inspired by this or some other litigation.

It is true that there were statutory provisions prohibiting an irrigation company from selling water *in excess of its appropriation*. (Sections 3065 and 5636, Idaho Comp. Stats.) Such provisions have no application in this case, since the water appropriated by the State to the irrigation company was vastly in excess of the amount sold by the irrigation company, whatever construction is put upon the contracts. The presence of these provisions is significant, however, in that it emphasizes the absence of any provisions dealing with the adequacy of water supply or the amount of land to be reclaimed by a given project.

The form of the state statutes is clearly persuasive to the conclusion that at the time of the amendment of the Carey Act and thereafter for many years it was the opinion of all interested parties that the Secretary of the Interior was to determine the adequacy of the water supply and the amount of land to be reclaimed, and that thereupon those questions would be foreclosed forever.

In the light of the traditional policy of Congress, the history, purpose and provisions of the

statute, and the contemporary understanding of the State as expressed in its legislation, we submit that the Carey Act confides to the Secretary of the Interior the duty and the authority to conclusively determine how much land of the United States should be irrigated by this project; that that determination is binding upon the State, its agent, the irrigation company, and its assigns the settlers; and that any attempt to reduce the amount of land to be so irrigated which is based upon an alleged agreement between the irrigation company and the settlers and an alleged inadequacy of the water supply must be denied by the courts.

We shall mention one other point. We have heretofore assumed that the contracts between the irrigation company and the settlers guarantee the settler a specified amount of water. Is this the correct construction of those contracts? Throwing our minds back to the time when these contracts were prepared, we think it is fair to say that there was no reason to expect to find therein an obligation by the irrigation company to deliver a given amount of water. The very spirit of the Carey Act was co-operation and mutual equality. Its purpose was to supplant the rule of priority of appropriation by the principle of proportionate interests. For the protection of the settlers the amount of the possible profit of the irrigation company was limited. The price at which water rights might be sold was expressly fixed by the State in order that the receipts of the irrigation company should not exceed "the actual cost and necessary expenses of

reclamation and reasonable interest thereon." Under these circumstances, was it to be expected that the irrigation company would guarantee not only the capacity and serviceability of the system, but also the amount of water which nature would place at its disposal?

When we look at the contracts, do we find an express agreement by the irrigation company to deliver a specified amount of water—a provision sufficiently clear and unequivocal to remove the instinctive doubt that such an obligation could have been contemplated?

The plaintiffs rely upon two provisions in the contracts. One is in the contract between the company and the State, whereby the company

> "agrees to furnish and deliver to the owners of shares in said reservoir and irrigation system, as specified in other provisions of this contract, all of said appropriated waters to which the said second party may be entitled, to the extent of one-eightieth (1/80th) of one (1) cubic foot per second of time per acre."

The plaintiffs say that this constitutes an agreement to deliver a specified amount of water. The language used seems hardly capable of that construction. First, it is to be noted that there is no statement of the amount of water which the company agrees to supply. That is covered elsewhere in the contract, when it is said with respect to the appropriated water of the company that each water right

> "shall entitle the purchaser to a proportionate interest only therein, the water rights

> having been taken for the benefit of the entire tract of land to be irrigated from the system."

The reference to one-eightieth of one cubic foot per second of time was inserted to make clear, not the amount of water that the settler should receive, but the rate at which the company should "furnish and deliver it." This was a necessary provision. The settler needs something more than an agreement to give him a proportionate share of the water. He needs an agreement that the company will "furnish and deliver" it in such volume that it will flow through his ditches. On the other hand the company must have a limitation upon the rate of flow which the settler can require; otherwise, the settler will constantly demand that water be delivered in greater volume.

The other provision relied upon by the plaintiffs is the statement in the contract between the company and the State that the certificates of shares of stock shall

> "define the interest thereby represented in the said system, to wit: A water right of one-eightieth (1/80th) of a cubic foot per second for each acre and a proportionate interest in said reservoir and irrigation system, based upon the number of shares ultimately sold therein"

and the statement in the certificate itself that

> "each share entitles the owner thereof to receive one-eightieth of a cubic foot of water per second of time * * * and a proportionate interest in the dam, canal, reservoir, water

rights and all other rights and franchises of the company, based upon the number of shares finally sold."

When it is remembered that these provisions expressly are to be "construed in conjunction with" the Carey Act and that it is repeatedly stated that the interest of the settler is only a proportionate interest, it is clear that the reference to one-eightieth of a cubic foot per second prescribes the duty of the company in furnishing and delivering water and fixes the maximum rate of flow, without attempting to impose an obligation to deliver a specified amount of water. If it had been intended to impose such an obligation, very different phraseology would have been employed. The obligation would have been stated in terms of an annual amount of water,—not in terms of an amount per second which obviously, and under all of the decided cases, could not be delivered continuously throughout the year without involving an enormous waste of water.

Under our construction of the contracts, their provisions accord with the scheme and spirit of the Carey Act, the determination of the Secretary of the Interior and the common sense of the situation. So construed, the contracts are fair to both the irrigation company and the settlers. The irrigation company is bound to do everything humanly and physically possible—but no more—in furnishing water to the settlers. It takes the abundant risk that it can sell water rights at a price and to an extent which will repay the "actual cost and necessary expenses" of the system "and reasonable interest thereon." The settlers are

protected by the unprejudiced investigation of State and Federal officials, are guaranteed an adequate system and efficient service, and are required to take only the risk which in greater or less degree every farmer must accept—that nature will provide sufficient water.

Respectfully submitted,

HARRISON TWEED,
Counsel for The Equitable Trust Company of New York and Lyman Rhoades, as Trustees, et al.